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Supreme Court of the United States

OCTOBER TERM, 1970.

No. 904

WILSON BURTON, ET AL.,
Defendants-Appellants,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY, AS TRUSTEE UNDER TRUST No. 16963,
Plaintiff-Appellee.

(Together With 80 Other Cases.)

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL.

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IN THE

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OCTOBER TERM, 1970.

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WILSON BURTON, ET AL.,
Defendants-Appellants,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY, AS TRUSTEE UNDER TRUST NO. 16963,
Plaintiff-Appellee.

(Together With 80 Other Cases.)

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL.

Hamilton Corporation, Lawson Corporation, Independence Homes, Inc., Rosewood Corporation, Larchmont Home Development Co., Chatham Town Homes, Inc. and Jarvis Homes, Inc., Plaintiffs-Appellees in 55 of the 81 cases sought to be appealed to this Court, move pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the Federal

question sought to be reviewed was neither raised in nor passed on by the Supreme Court of Illinois and because no substantial Federal question is presented and further move pursuant to Rule 16(d) of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the issues allegedly involved are moot.

The Constitutionality of the Appeal Requirements of the Forcible Entry and Detainer Act of Illinois Was Neither Raised in nor Passed on by the Supreme Court of Illinois in any of These Cases.

Appellants admit at page 1 of their jurisdictional statement that there is no opinion below in these cases. Actually, no decision was rendered in these 81 cases by the Supreme Court of Illinois other than an order dismissing the appeals for failure to comply with Notice of Appeal requirements. Moreover, these Appellants did not challenge such appeal requirements under either the United States Constitution or the Constitution of the State of Illinois in either the trial court or the Supreme Court of Illinois. Their failure to raise the constitutional issues in the trial courts would have precluded their being raised in the Supreme Court of Illinois, *Pickus* v. *Board of Education*, 9 Ill. 2d 599, 610; *The People* v. *Luckey*, 42 Ill. 2d 115, 117; *Shilvock* v. *Retirement Board of Policemen's Annuity and Benefit Fund of Chicago*, 375 Ill. 68.

It is patently clear that these Appellants did not make any claim in the Supreme Court of Illinois that such appeal requirements were unconstitutional as they claim to have done by "their" brief on appeal to the Illinois Supreme Court on February 10, 1970 (page 2 of jurisdictional statement). The fact is these Appellants requested the Supreme Court of Illinois to grant them leave to file notices of appeal in that court on February 17, 1970 (Appellants' Ap-

pendix, page 7, paragraph 4b). That motion was not allowed by the Supreme Court of Illinois until March 10, 1970 (Appellants' Appendix, page 7, paragraph 5b). Hence, it is clear they did not even seek leave to appeal to the Supreme Court of Illinois until seven days after the brief was filed by other litigants, who are not parties to these purported appeals, and that they had no right to file any brief with the Supreme Court of Illinois until a month after that brief was filed by such other litigants. The decision of the Supreme Court of Illinois in *Rosewood Corporation, et al.* v. *Chester J. Fisher, et al.* (Appellants' Appendix 5) rendered April 15, 1970, explicitly refutes Appellants' claim in this Court that such issues were raised by them in the Supreme Court of Illinois. In the *Fisher* decision the court said, Appellants' Appendix, page 21, that these cases were allowed to be brought to this court on the eve of oral argument in the *Fisher* and *Jackson* cases and subsequent to the time that briefs had been filed. The Supreme Court of Illinois then said:

> "We therefore hold these appeals under advisement and, under the circumstances, hold that the parties thereto may file such motions and briefs as they deem desirable in accordance with the regular briefing schedule of this court computed from the date of filing of this opinion."

However, on May 8, 1970 the Illinois Supreme Court on its motion re-examined the order granting these Appellants leave to appeal to that court, determined that such motion had been improvidently granted, vacated and set aside its order of March 10, 1960, and dismissed these appeals (Appellants' Appendix, page 8, paragraph 1). This order was entered before any briefs were filed by these Appellants with the Supreme Court of Illinois or any arguments made to that court.

Appellants listed in Appendix 1 to the jurisdictional statement sought leave to file notices of appeal on the theory that Rule 303(e) of the Rules of the Illinois Supreme Court permitted such a motion. But, Rule 303(b)(1) expressly made the provisions of Rule 303(e) inapplicable.

Appellants contend that with regard to those cases listed in Appendix 2 to the jurisdictional statement that the motion for leave to file notices of appeal made more than 60 days after the entry of the judgments was authorized by Rule 366(a)(5) of the Rules of the Supreme Court of Illinois. But, that rule pertains to the powers of the reviewing court in cases on appeal and has no effect whatsoever on the time within which the notice of appeal must be filed in order to obtain jurisdiction for the appeal.

Appellants incorrectly state in their footnote on page 9 of the jurisdictional statement that prior to January 1, 1970, the Rules of the Illinois Supreme Court were in conflict with the appeal provision of the Forcible Entry and Detainer Act of Illinois and allowed 30 days within which to file a notice of appeal in all cases. The fact is that Rule 1 of the Illinois Supreme Court Rules in effect prior to January 1, 1970 provided in part as follows:

> "The rules on appeal supersede provisions of the Civil Practice Act and the Injunction Act inconsistent with the rules, and govern all appeals except to the extent that the appellate procedure in a particular kind of action is regulated by a statute other than the Civil Practice Act or the Injunction Act."

Since the Forcible Entry and Detainer Act of Illinois has at all times provided a specific procedure for appeal from a judgment of the trial court, that statute governed appeals in such proceedings prior to January 1, 1970. After January 1, 1970 Illinois Supreme Court Rule 303(b)(1) specifically adopted the appellate procedure set forth in the

Forcible Act. The Illinois Supreme Court Rules Committee, the Chairman of which is a partner in one of the firms representing these Appellants, stated in the Committee Comments with regard to this Rule as follows:

> "Paragraph (b) was inserted in the rule in 1969 as a part of the revision designed to make the Supreme Court rules applicable to appeals that were formerly governed in whole or in part by special statutes. The authority for this action is found in the provision of the Judicial Article, effective January 1, 1964, that directs the Supreme Court to 'provide by rule for expeditious and inexpensive appeals.' Ill. Const., Art. VI, Sec. 7."
>
> "The statutory provisions incorporated by reference govern appeals in forcible entry and detainer and local improvement litigation. These special statutory proceedings have peculiar characteristics, arising from the nature of the problems with which they deal, which require that the trial and appellate procedures be closely integrated, as they are in the statutes."

Since no ruling was made by the Supreme Court of Illinois and none could have been made with regard to the constitutionality of the appeal requirements of the Illinois Forcible Entry and Detainer Act in these cases, no right of appeal to this Court exists under Title 28, United States Code, Section 1257(2).

This Court's decision in *John* v. *Paullin*, 231 U. S. 583, is directly in point. In that case this Court said at page 585:

> "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by

> us consistently with the familiar limitations upon our authority. * * * Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

And at page 586:

> "Thus it appears nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matter shown in the record and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the Constitution and laws of the state. In short, the judgment of dismissal turned entirely upon a question of local law."

See also: *Raley* v. *Ohio*, 360 U. S. 423, 435 and *Street* v. *New York*, 394 U. S. 576, 581.

Appellants contend at page 3 of their Jurisdictional Statement that jurisdiction is sustained by *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-83. That decision actually supports this motion to dismiss. In *Lawrence* this Court stated at page 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected *when such judicial action is properly invoked.*" (Emphasis supplied.)

Here, there was clearly no compliance with the requirement for invoking judicial review of the judgments in favor of Appellees in the cases now sought to be appealed to this Court. In addition, since the validity of the Illinois Forcible Entry and Detainer Act appeal provisions was not challenged by Appellants in either the trial courts or in the Supreme Court of Illinois, no basis exists for this purported appeal.

There Is No Substantial Federal Question.

Assuming *arguendo* that Appellants had claimed that the equal protection clause and the due process clause precluded the State from providing for a shorter appeal period in Forcible Act cases and that the Supreme Court of Illinois had ruled adversely, such ruling would not present a substantial Federal question.

Appellants claim in this Court that the shorter appeal period in such cases constitutes discrimination is without merit. In *Spring, Inc.* v. *Little*, Docket Nos. 41730, 41739 cons., the Supreme Court of Illinois held on November 18, 1970 as follows:

> ". . . A short period of time for taking an appeal and a compulsory bond requirement are not violative of due process or equal protection if there are valid and justifiable bases for differentiating between different classes of litigation. There is no contention, and indeed, none can be made, that there is any differentiation in the treatment accorded either litigant in a forcible entry and detainer proceeding. The abbreviated time for perfecting an appeal is in keeping with the summary nature of the proceedings. * * * In the case of forcible entry and detainer there are strong reasons for a differentiation from other types of litigation. * * * It appears that these reasons were the implied basis for this court's commentary in *Board of Education* v. *County Board of School Trustees*, 28 Ill. 2d 15, 19, that 'we can conceive of substantial reasons for providing short appeal periods in forcible detainer matters—not the least of which may be the possibility of serious or irreparable damage by irresponsible tenants who might otherwise remain longer in possession'. A delayed appeal would be inconsistent with the purpose of the Forcible Entry and Detainer Act of providing a summary remedy in which the rights of parties may be speedily determined, *Kruse* v. *Ballsmith*, 332 Ill. App. 301, 307."

The same day the Supreme Court of Illinois filed its decision in *Alexander, et al. v. Hamilton Corporation, et al.*, Appendix 7 to Appellants' Jurisdictional Statement. The Illinois Supreme Court held with regard to the contention made there that the notice of appeal provision of the Forcible Act constituted a denial of equal protection at Appendix page 32:

> ". . . But the equal-protection clause of the Fourteenth Amendment does not prevent a State from adjusting its legislation to differences in situation, and a statute affecting a classification of persons or objects is not unconstitutional merely because it affects one class and not another, provided it affects all members of the same class alike and so long as the classification is not arbitrary and founded upon some substantial difference in circumstances or condition properly related to the classification.
>
> • • • • •
>
> "The legislature could reasonably determine that eviction proceedings against contract buyers, for the most part, result from their failure to pay contract installments, and that to permit a defaulting buyer to have a 30-day appeal period would be to permit him another month of occupancy and possession without charge. And, on the other side of the coin, the party found to be entitled to possession is denied the money that sale or rental to another might bring and, in effect, is restrained from alienating the property in question while the possibility of an appeal is hanging in the balance. And perhaps to a greater degree than in the case of a tenant, the legislature could properly consider that a longer period in which to file a notice of appeal and security bond in forcible entry and detainer proceedings could result in abuses and irretrievable loss. Maintenance and the making of necessary repairs could be abandoned in the face of the judgment of possession. Fixtures could be removed, insurance could be cancelled if the obligation to provide a policy is on the buyer, and it is not inconceivable that

> a vengeful defendant could misuse and damage the premises. The legislature could therefore conclude that, in proceedings of this nature, there is a need for expeditious review and for properly securing the party against whom review is sought against loss and damage. Under the circumstances, we cannot say that the statutory distinctions between forcible entry litigants and those in other actions are 'purely arbitrary', or that they create an 'invidious discrimination'. *Morey* v. *Doud*, 354 U. S. 457, 463, 1 L. Ed. 2d 1485, 77 S. Ct. 1344; see also 16A, C. J. S., § 559."

The foregoing statement of the Illinois Supreme Court reflects the reality of the situation. In almost every instance where the property was restored to Appellee's possession in these cases extensive deliberate damage to the houses was present and it was necessary to expend substantial sums to put the properties in suitable condition for leasing or make similar concessions to the lessee who undertook to make such repairs himself. In addition, there was an almost general pattern of fixtures having been removed prior to Appellee's regaining possession. Kitchen cabinets, built-in ovens and ranges, plumbing fixtures, window frames, intercommunication systems, sump pumps and even door knobs were among the items removed.

Appellants contend that similar questions are now before this Court in *Sanks* v. *Georgia*, restored to calendar for re-argument, 399 U. S. 922. This is not correct. The statute involved in *Sanks* v. *Georgia* requires a defendant in a eviction proceeding to file a bond as a condition precedent to a trial on the merits. No similar provision is contained in the Illinois Forcible Entry and Detainer Act. The only bond requirement provided by the Illinois statute relates to an appeal from a final judgment after a trial on the merits and such bond is required of any litigant, whether plaintiff or defendant, who elects to appeal from an adverse

judgment for possession (Chapter 57, Illinois Revised Statutes, §§ 19, 20 and 21).

But, Appellants have no standing to challenge the constitutionality of the appeal bond provision of the Forcible Act, because that provision did not adversely affect any of them. In only two cases of the 55 cases involving these Appellees did the Appellants request the trial court to fix the amount of an appeal bond and even in those cases they did not file notices of appeal. Consequently any attack on the constitutionality of the appeal bond provisions of the Forcible Act is being made by Appellants insofar as it may have affected other persons. See *United States* v. *Raines*, 362 U. S. 17, 21.

Appellants ignore the fact that they did not even file notices of appeal and argue in this Court that they should have been allowed to appeal without filing a supersedeas bond. They quote from the slip opinion of the Illinois Supreme Court in *Jack Springs, Inc.* v. *Little* at page 20 of the Jurisdictional Statement and assert on the basis of such quotation that the court "seems to conclude that appeals in Forcible Act cases are not conditioned on the filing of a bond." However, the language upon which they rely was deleted by the Supreme Court of Illinois in its corrections of the opinion. Obviously a decision which would allow an appeal in this type of action without the filing of a supersedeas bond would be illogical. The only issue involved in the action is the right of possession. If that issue is decided against the occupant of the premises and an appeal is allowed without a supersedeas, then the issue would become entirely moot during the pendency of the appeal because the writ of restitution would have issued, possession would have been delivered to the plaintiff, and the property would then be leased or sold to third persons who were not parties to the litigation and whose inter-

vening rights could not be affected by the appeal. The net result would be a meaningless appeal and a useless burden on the time of the courts of review. Of course, mootness would not occur if execution on the judgment of the court was prevented by the force of mob action, and such action would be encouraged and fostered by allowing an appeal without a supersedeas bond.

It is equally clear that if the filing of a notice of appeal was permitted to operate as a supersedeas of the judgment for possession without the filing of a bond by reason of the assertion that the occupant of the premises was "poor", then the unsuccessful party would be invited to use the property and the owner would be deprived of all protection from financial loss and damage during the pendency of the appeal, which on average in civil cases in the appellate division involved here requires eighteen months. Without doubt the owner would suffer an effective taking of his property without due process.

Lastly, Appellants contention that they were denied an appeal because of their "poverty" represents a distortion of the facts. None of the Appellants sought to defend the proceedings necessarily brought under the Forcible Entry and Detainer Act of Illinois as poor persons, nor could they. Appellants in the 55 cases involving these Appellees were the purchasers of newly constructed solid brick three and four bedroom homes. On July 1, 1969 they undertook for the second time a concerted payment strike against Appellees with the sole purpose of financially coercing Appellees into renegotiating the amount Appellants had agreed to pay for the homes involved. The statement of the Supreme Court of Illinois in *Alexander* v. *Hamilton*, reproduced in Appellants' Appendix at page 27, bears emphasis with regard to this claim of "poverty":

> "In what must be viewed as a belated effort to create standing to raise the constitutional point they

> seek to make, defendants have, however, filed so-called 'poverty affidavits' in this court. We say 'so-called' because in our opinion the affidavits, with few if any exceptions, fail to establish defendants as indigent persons. Indeed, one of them claiming to be impoverished admits to a take-home pay of $1,250 per month, savings of $3,000, and the ownership of two automobiles, including a 1970 Cadillac."

Appellees submit that they have demonstrated that there is no substantial Federal question involved in these purported appeals.

All of the Cases Involving These Appellees Are Moot.

Each of the 55 cases involving these Appellees is moot. In 20 of the cases Appellants are no longer in possession of the properties involved and they have been leased to third parties who are not involved in this litigation. Therefore, any decision by this Court in this purported appeal could not benefit any of those Appellants because of the intervention of rights of third persons. Appellants in 30 of the remaining 35 cases have pursuant to stipulation reinstated their contracts with Appellees and continue to perform their contractual obligations. Hence, no controversy exists between the parties and no issues are present for adjudication. In four of the remaining five cases Appellants were either evicted or vacated the premises and the premises were subsequently fire bombed or otherwise burned by unknown persons. Those properties remain uninhabitable. In the remaining case the would-be Appellants were evicted by the Sheriff of Cook County, Illinois, moved back into the premises following the eviction and have been enjoined from intefering with Appellee's right to possession of the property in an action which is separate and distinct from any proceeding sought to be brought here.

Appellees submit that the above captioned purported appeal to this Court is entirely moot with regard to the cases in which they are involved.

This Court should note that Appellees are informed and believe that the attorneys for Appellants do not even represent some of the Appellants on whose behalf the Jurisdictional Statement was filed.

Respectfully submitted,

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